City & DOH v. L. 237, CEU, 61 OCB 43 (BCB 1998) [Decision No. B-43-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
THE CITY OF NEW YORK and the DEPARTMENT OF HEALTH,	:	
	:	Decision No. B-43-98
Petitioners,	:	Docket No. BCB-1936-97
	:	(A-6772-97)
-and-	:	
	:	
CITY EMPLOYEES UNION, LOCAL 237 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On October 2, 1997, the Department of Health and the City of New York (hereinafter referred to as "Department" or "City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the City Employees Union, Local 237, International Brotherhood of Teamsters, AFL-CIO ("Union"). The Union filed its answer on January 12, 1998. The City filed its reply on July 17, 1998.

BACKGROUND

Edward Burt ("grievant") was employed by the Department as a Special Officer. On April 6, 1995, the grievant was notified by the commissioner of Health that he was being charged with violating Department Standard of Conduct Rule 7(a) and 7(b), excessive unauthorized absence and

lateness. On January 30, 1996, grievant and the Union entered into a Stipulation of Settlement ("Stipulation") with the Department resolving the disciplinary action against the grievant. In the Stipulation, grievant agreed to be placed on probation for a six month period. The Stipulation also included a provision which stated that grievant "waived all rights guaranteed to him under §§75 and 76 of the New York State Civil Service Law and the grievance procedure as outlined in the union's contract with the City of New York." On May 31, 1996, grievant was mailed a letter from the Department's Employment Law Unit, notifying the grievant that pursuant to the terms of the Stipulation, his employment with the Department was terminated effective on the close of business on May 31, 1996.

The Union's answer states that it requested a Step II determination, to which the City did not respond. On January 27, 1997, a Step III hearing was requested by the Union, stating that no Step II determination was issued and no charges and specifications have been received by the Union. It stated that the Union believes that the grievant did not violate his probation and therefore was entitled to his disciplinary rights. On February 3, 1997, a Step III decision was issued by an OLR Review Officer, denying the grievance. It stated that, as the grievance concerned a stipulation of settlement that was appealed pursuant to § 75 of the Civil Service Law, the grievance could not be addressed in this forum.

On June 2, 1997, a request for arbitration ("RFA") was filed by the Union, alleging that the grievant's termination was improper. The contract provision which the Union claimed had been violated was Article VI, §1 of the parties' agreement.[1]

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[1] Article VI, § 1 of the parties' collective bargaining agreement defines the term "grievance." Of the six provisions in § 1, none was specifically mentioned in the RFA.

POSITIONS OF THE PARTIES

City's Position

The City contends that the grievance must be dismissed since it fails to allege any nexus between the act complained of and the provision of the agreement cited by the Union. The City alleges that, specifically, the Stipulation signed by both the grievant and the Union precludes arbitration of her termination. It argues that the grievant was discharged pursuant to the Stipulation settling the prior disciplinary case. It argues that the Stipulation states that grievant waived all rights granted to him under the provisions of "Section 75 and 76 of the New York State Civil Service Law and the applicable contractual grievance procedure as outlined in his union's contract with the City of New York." [2] As such, they argue, the grievant has waived his right to a hearing concerning any disciplinary action taken against him as a result of his failure to abide by the terms of the Stipulation, and the instant grievance should be dismissed in its entirety.

Union's Position

The Union claims that they have stated a nexus, as they assert that the grievant was "wrongfully terminated" because he was in full compliance with the Stipulation at the time his employment was terminated. It asserts that on April 13, 1996, during his fourth month of probation, grievant was scheduled to work Voluntary Overtime, and he was unable to report due to a family

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However, the Union, in its answer, stated that the subdivision they wish to grieve is subdivision (e). It reads, in pertinent part:

A claimed wrongful disciplinary action taken against a permanent employee covered by §75(1) of the Civil Service Law . . .

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[2] The City cites Decision No. B-21-90, in support of this contention.

emergency. He received two memos, the subject of which was grievant's fourth month of probation, from a Sgt. Savoca stating that the "absence may be considered unauthorized which could lead to his termination and that a second occurrence will result in your being removed from working overtime and probably your termination." The Union asserts that the Employment Law Unit, in a letter, set up a meeting with grievant concerning a violation of probation. Between the time of the letter from the Employment Law Unit and the meeting, the Union alleges that Sgt. Savoca sent a memo which stated that grievant had no unauthorized lateness or absences and that he had satisfactorily completed his fifth month of his probation. It also alleges that after his meeting with the Employment Law Unit, his employment with the City was terminated.

The Union contends that grievant's employ was not terminated pursuant to an unauthorized absence which violates the Stipulation, but rather due to some other reason for which he was never formally charged. They argue that he was allowed two latenesses per month under the Stipulation and there is clear evidence that the Stipulation was not violated. Hence, it argues, the discharge is reviewable under the parties' collective bargaining agreement.

DISCUSSION

When a request for arbitration is challenged by the City, initially, this Board must determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related to the cited provision of the parties' agreement.[3] In the instant proceeding, there is no dispute that the parties herein have agreed to arbitrate claims regarding a wrongful disciplinary action taken against a permanent employee covered by §75(1) of

[3] Decision Nos. B-7-98; B-19-89; B-65-88; B-28-82.

the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges. The question presented to us is whether the City's determination to terminate the grievant's employment is subject to review under the contractual grievance and arbitration procedure.

The Board previously considered a case wherein we found that a stipulation of settlement of disciplinary charges precluded resort to contractual grievance procedures for the resolution of subsequent disciplinary charges.[4] There, the grievant was a provisional employee who executed the stipulation of settlement whereby he agreed to waive any rights under the law or applicable contract in the event that his employment were terminated for a breach of the terms of the stipulation. He was placed on probation pursuant to the terms of the stipulation and was discharged, the day after the probationary period ended, for misconduct which occurred during the probationary period established by the stipulation. The Board held that the grievant's discharge was not subject to the contractual grievance and arbitration procedure because the parties to the stipulation had agreed that misconduct during the probationary period would constitute a basis for summary dismissal.[5] Although the language of the stipulation differed from the language in the instant case, the employer in both cases retained exclusive authority to determine whether or not the terms of the stipulation had been violated on a month-by-month basis,[6] where grievant's performance would be assessed at

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[4] Decision No. B-21-90.

[5] *Id.*

[6] The stipulation in the earlier case required the grievant to submit to physical examination and drug testing "when ordered to do so by the Department in accordance with the provisions of Uniform Code of Discipline." Refusal to comply was to be deemed a violation of the stipulation, and the presence of any illegal drug, "as determined by the aforementioned

the end of each month. In arguing that the instant grievance is arbitrable, the Union would have this Board decide whether the City violated the terms of the Stipulation. We decline to do so.

In light of the clear language of the Stipulation, we do not find any authority for this Board - or an arbitrator - to review the actions of the City in terminating the grievant's employ. The question of whether there was sufficient basis to dismiss the grievant is tantamount to the ultimate question which, absent the Stipulation, arguably could be arbitrated. That question is whether the grievant was wrongfully disciplined under the collective bargaining agreement. This result is compelled by the clear language of the Stipulation that the grievant and the Union signed. The Employment Law Unit, after a meeting with the grievant, made a determination that the grievant's actions violated his probation and thus the terms of the Stipulation.[7] Though the City is not barred from a review and reconsideration of the determination, grievant's recourse, as a consequence of the Stipulation, cannot lie in this forum. Accordingly, the instant petition challenging arbitrability is granted.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City

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examination or testing" was also grounds for grievant's discharge."

[7] The Union's assertion that Sgt. Savoca's memo cleared grievant of any unauthorized lateness or absences during the fifth month of probation may be construed as an argument that he had satisfactorily completed all five months of his probation until that point, thus casting doubt on the Employment Law Unit's determination that grievant had violated his probation. We are not persuaded by this argument, as it is apparent from previous memos on the record that grievant's status was reviewed on a month-by-month basis, with each memo relating to that month and that month alone.

Collective Bargaining Law, it is hereby,

ORDERED, that the petition challenging arbitrability filed by the City of New York, be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the City Employees Union, Local 237 be, and the same hereby is denied.

Dated: New York, New York
September 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
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